No. 15814

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LODGE 942, AFL-CIO, *Respondent*

On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

This case is before the Court upon the petition of the National Labor Relations Board to enforce its order (R. 24-26) issued against the International Association of Machinists, Lodge 942, AFL-CIO, hereafter called the Union, on November 4, 1957, following the usual proceedings under Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Sec. 151, *et seq.*).

STATEMENT OF THE CASE

The Board found that the Union engaged three forms of activity: (1) For nearly a year from August 16, 1955 to July 13, 1956, except for a four to six week interval during the winter of 1955-1956, the Union peacefully picketed the premises of Alloy Manufacturing Company. The picketing was carried on by a single person. The picket sign originally read "This firm is Nonunion" and was later changed to read "Nonunion employees unfair." (R. 39; 70, 73-75, 106-107, 108.) (2) On June 20, 1955, the Union wrote to the Spokane Central Labor Council requesting that Alloy be placed on the Council's "We Do Not Patronize" list. On July 27, the Council placed Alloy on the list. The list is published in the "Labor World," the official periodic publication of the Council. (R. 37, 38; 58, 71, 76, 115-116, 122-123.) (3) The Union asked several of Alloy's customers not to patronize Alloy (R. 21, 39-40; 79-82).

The Board found that the Union carried on this three-faceted activity for the purpose of inducing Alloy (1) to recognize the Union as the exclusive representative of its employees, and (2) to enter into a union shop agreement with it (R. 19, 20, 23-24, 52). The Board also found that the Union did not represent a majority of Alloy's employees (*ibid.*). The Board concluded, based on its finding that the Union sought exclusive recognition when it had no majority, that by each of the three separate facets of its activity—the picketing, the "We Do Not Patronize" list, and the customer appeals—the Union violated Section 8(b)(1)(A) of the Act (R. 19, 23-24). Section 8(b)(1)(A) provides that it shall be an unfair labor practice for a labor organization or its agents "to restrain or coerce employees (A) in the exercise of the rights guaranteed in section 7. . . ." Section 7 provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain

> collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

The Board further concluded, based on its finding that the Union sought a union shop agreement when it had no majority, that by each of the three separate facets of its activity the Union independently violated Section 8(b)(2) and(1)(A) of the Act (R. 19-20, 52). Section 8(b)(2) provides that it shall be an unfair labor practice for a labor organization or its agents "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3). . . ." Section 8(a)(3) makes it an unfair labor practice for an employer to encourage or discourage membership in a labor organization by discrimination in employment, and *inter alia* excepts a union shop agreement from its scope if the "labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made. . . ."

The Board's order requires the Union to cease and desist from (1) "Restraining or coercing employees of Alloy . . . in the exercise of the rights guaranteed in Section 7 of the Act", and (2) "Attempting to cause Alloy, by means of picketing or by threatening to divert business from Alloy, to discriminate against Alloy's employees in violation of Section 8(a)(3) of the Act" (R. 24-25). The Union is also required to post notices (R. 25).

SUMMARY OF ARGUMENT

I

Picketing to secure the recognition of a minority union does not violate Section 8(b)(1)(A) of the Act.

A. Section 8(b)(4)(C) of the Act is the key to the invalidity of the Board's interpretation of Section 8(b)(1)(A). By Section 8(b)(4)(C) Congress has expressed the sole extent to which it intends to regulate as an unfair labor practice picketing by a union of an employer to secure that employer's recognition of it as the representative. And by Section 8(b)(4)(C) Congress has restricted such picketing for recognition only in the situation where *another* union has been *certified* by the Board as the representative of the employees. To prohibit picketing for recognition in any other situation, as the Board by its interpretation of Section 8(b)(1)(A) does, is to embrace a purpose which Congress has deliberately renounced.

B. If Section 8(b)(4)(C) means what it says, then Section 8(b)(1)(A) cannot mean what the Board holds. The two indeed have separate functions which do not overlap. Section 8(b)(4) is concerned with the "end sought," with defining "proscribed objectives." *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, 702; see also *id.* at 704. By Section 8(b)(1)(A), on the other hand, "Congress was aiming at means, not end." *Perry Norvell Co.*, 80 NLRB 225, 239. "By Section 8(b)(1)(A), Congress sought to fix the rules of the game, to insure that strikes and other organizational activities of employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force, or of economic reprisal." *Ibid.* When the Board interprets Section 8(b)(1)(A) to prohibit peaceful picketing, because its *purpose* is to secure the recognition of a minority union, it transforms Section 8(b)(1)(A) from a provision designed to curb picketing, when conducted by coercive

means, into an instrument to curb picketing, however peaceful, because of the end it furthers. This fundamentally alters the function of Section 8(b)(1)(A) within the statutory scheme.

C. The Board's construction of Section 8(b)(1)(A) conflicts with Sections 8(c) and 13; it reverses a long-standing interpretation; and it renders Section 8(b)(4)(C) redundant.

1. Section 8(c) protects, and peaceful picketing constitutes, the "expressing" and "dissemination" of "views, argument, or opinion" "in written, printed, graphic, or visual form." The Supreme Court's decision in *Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, confirms the exemption of peaceful picketing from the reach of Section 8(b)(1)(A) and the applicability of Section 8(c) to guarantee is immunity.

2. "By § 13, Congress has made it clear that * * * all * * * parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment, or diminution is 'specifically provided for' in the Act." *N.L.R.B.* v. *International Rice Milling Co.*, 341 U.S. 665, 673. There is nothing in Section 8(b)(1)(A) which "specifically" provides for the impairment of the right to strike and picket which the Board would effect. See *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270, 284. Little indeed would be left of the right to strike if the right to picket were not protected as an inseparable part of it (*Schultz Refrigerated Service, Inc.*, 87 NLRB 502, 504-505), and for that reason section 13 cloaks both (*Sales Drivers Union* v. *N.L.R.B.*, 229 F. 2d 514, 517-518, cert. denied, 351 U.S. 972).

3. By its present construction of Section 8(b)(1)(A), adopted late in 1957, the Board overturns a settled and uniform interpretation first made in 1948, within a year of the effective date of the Taft-Hartley amendments in

1947, and undeviatingly adhered to for nine years. "At this late date the courts ought not to uphold an application of the law contradictory of this settled administrative interpretation." *United States* v. *Chi. N.S. & Mil. R. Co.*, 288 U.S. 1, 13-14. This is peculiarly true here where the overturned interpretation involves a "contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 549, quoting from *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315.

4. Section 8(b)(4)(C) of the Act "has no place in this Statute if Section 8(b)(1)(A) can be interpreted broadly to forbid picketing by a minority labor organization for recognition. For the type of picketing prohibited by Congress in Section 8(b)(4)(C) necessarily is in the category now forbidden under Section 8(b)(1)(A). Thus, through administrative interpretation of one provision, the specific language of another statutory provision in this Act has been reduced to a useless gesture."[1] It goes without saying that "We are not at liberty to construe any statute so as to deny effect to any part of its language." *Washington Market Co.* v. *Hoffman*, 101 U.S. 112, 115-116.

D. "It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy . . . as such when, from the words of the statute itself, it is clear that those interested in just such

[1] Member Fanning dissenting in *Paint, Varnish & Lacquer Makers Union, Local 1232*, 120 NLRB No. 89, sl. op. p. 10, 42 LRRM 1195, 1197.

a condemnation were unable to secure its embodiment in enacted law." *Local 1976, United Brotherhood of Carpenters* v. *N.L.R.B.*, 357 U.S. 93, 99-100. The Board in this case has isolated a single principle, pushed it to a logical extreme, and reached a determination which Congress, fully ware of the whole range of the problem and the opposing claims and interests with which it bristles, has deliberately refrained from embracing. It is no part of the function of the Board to be "a super-Congress."[2]

II

Even if picketing to secure the recognition of a minority union is a violation of Section 8(b)(1)(A), the appeals to customers not to patronize the employer, and the request that the employer be placed on a "We Do Not Patronize" list, are not. An appeal for consumer support is not proscribed under any provision of the Act. It is affirmatively protected by Section 8(c). And it is within the Constitution's guarantee of freedom of expression.

III

Except for the finding that the Union violated Section 8(b)(2) of the Act by picketing to secure a union shop agreement when it had no majority, the remaining bases upon which the Board found statutory violations on the Union's part are without merit. The only additional feature relevent to these alleged violations is that the union sought entry into a union shop agreement when it had no majority. This adds nothing to recognition of a minority union. Both are a legally insufficient basis for finding a violation of either Section 8(b)(1)(A) or 8(b)(2).

IV

Upon the assumption that the Board properly found a violation of Section 8(b)(1)(A) of the Act, its order is

[2] *N.L.R.B.* v. *National Maritime Union*, 175 F. 2d 686, 691 (C.A. 2), cert. denied, 338 U.S. 954.

too broad in providing a blanket prohibition against "Restraining or coercing employees of Alloy Manufacturing Company in the exercise of the rights guaranteed in Section 7 of the Act" (R. 24). So uncircumscribed an order is at war with the principle that "To justify an order restraining other violations it must appear that they bear some resemblance to that which the . . . [wrongdoer] has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past." *N.L.R.B.* v. *Express Publishing Co.,* 312 U.S. 426, 437.

ARGUMENT

The Board found that the Union used three means to gain two objectives. The Union picketed, requested that Alloy be placed on the "We Do Not Patronize" list, and asked several of Alloy's customers not to patronize it, all for the purpose of inducing Alloy to recognize the Union as the exclusive representative and to enter into a union shop agreement with it. The central vice found by the Board in this conduct is that the Union did not represent a majority of Alloy's employees. The Board found that, insofar as the Union sought exclusive recognition and a union shop agreement, each objective constituted a separate basis for finding a violation of Section 8(b)(1)(A) of the Act. And, insofar as the Union sought a union shop agreement, the conduct independently violated Section 8(b)(2) of the Act. The Board did not differentiate among the means employed by the Union, blanketing the customer appeals and the "We Do Not Patronize" list with picketing, and illegalizing them all.

Each facet of the activity, while entailing overlapping elements, also presents to a significant degree different considerations. It will therefore facilitate analysis to treat each constituent part of the conduct separately. We begin with picketing to secure the recognition of a minority union, found by the Board to violate Section 8(b)(1)(A) of the Act.

I. PICKETING TO SECURE THE RECOGNITION OF A UNION WHICH DOES NOT REPRESENT A MAJORITY DOES NOT VIOLATE SECTION 8(b)(1)(A) OF THE ACT.

A. Section 8(b)(4)(C) of the Act Expresses the Sole Extent to Which Congress Intended to Regulate as an Unfair Labor Practice Picketing by a Union of an Employer to Secure That Employer's Recognition of It as the Representative.

Section 8(b)(4)(C) of the Act is the key to the invalidity of the Board's interpretation of Section 8(b)(1)(A). By Section 8(b)(4)(C) Congress has expressed the sole extent to which it intends to regulate as an unfair labor practice picketing by a union of an employer to secure that employer's recognition of it as the representative. And by Section 8(b)(4)(C) Congress has restricted such picketing for recognition only in the situation where *another* union has been *certified* by the Board as the representative of the employees. To prohibit picketing for recognition in any other situation, as the Board by its interpretation of Section 8(b)(1)(A) does, is to embrace a purpose which Congress has deliberately renounced.

Thus, Section 8(b)(4)(C), newly enacted in 1947, provides that it shall be an unfair labor practice for a labor organization or its agents to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal to work, "where an object thereof is":

> forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 9.

Prohibiting inducement or encouragement of employees to strike of course forbids peaceful picketing directed to the employees to influence them to engage in a work stoppage.[3]

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[3] *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, 700-705.

Equally clearly, however, to strike or picket for recognition is forbidden only where another union has been certified as the representative.[4] As the Senate Report states (S. Rep. No. 105, 80th Cong., 1st Sess., 22, in 1 Leg. Hist. 428):

> It is to be observed that the primary strike for recognition (*without* a Board certification) is *not* proscribed. (Emphasis supplied.)

In virtually identical terms, the House Conference Report states (H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 43, in 1 Leg. Hist. 547):

> It is to be observed that the primary strike for recognition (*without* a Board certification) was *not* prohibited. (Emphasis supplied.)

Congress thus restricted itself to a single narrow area of recognitional activity, namely, "Strikes and boycotts having as their purpose forcing any employer to disregard his obligation to recognize and bargain with a certified union and in lieu thereof to bargain with or recognize another union. . . ."[5]

Predecessor versions of Section 8(b)(4)(C) embraced much broader prohibitions. The House bill, as reported and passed,[6] and an early version of the Senate bill,[7] prohibited "any strike or other concerted interference with

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[4] See, H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 44, in 1 Leg. Hist. 548; S. Rep. No. 105, 80th Cong., 1st Sess., 22, in 1 Leg. Hist. 428; 93 Cong. Rec. 1844, 1846, 4905, in 2 Leg. Hist. 981-982, 986, 1455; 93 Cong. Rec. 136; 5 *Hearings before Committee on Education and Labor, House of Representatives, on Bills to Amend and Repeal the National Labor Relations Act*, 80th Cong., 1st Sess., 3161-62; 4 *Hearings before the Committee on Labor and Public Welfare, United States Senate, on S. 55 and S. J. Res. 22*, 80th Cong., 1st Sess., 1905.

[5] H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 44, in 1 Leg. Hist. 548; S. Rep. No. 105, 80th Cong., 1st Sess., 22, in 1 Leg. Hist. 428.

[6] H.R. 3020, 80th Cong., 1st Sess., Sec. 12(a)(3)(C), in 1 Leg. Hist. 79, 205; see also H. Rep. No. 245, 80th Cong., 1st Sess., 44; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 59; both in 1 Leg. Hist. 335, 563.

[7] S. 360, 80th Cong., 1st Sess., Sec. 13(b) (January 27, 1947).

an employer's operations, an object of which is (i) to compel an employer to recognize for collective bargaining a representative not certified under Section 9 as the representative of the employees, or (ii) to remedy practices for which an administrative remedy is available under this Act, or (iii) to compel an employer to violate any law or any regulation, order, or direction issued pursuant to any law." This proposal banned any recognition strike or picketing except where the labor organization was certified by the Board as the exclusive bargaining representative. In its ultimate evolution, this total ban of any recognition strike or picketing, except in support of the status of a certified union, was narrowed to its present form, which prohibits a recognition strike or picketing only if another union has been certified. Thus, instead of preconditioning the validity of a recognition strike or picketing upon the existence of a certification of the striking or picketing union, Congress did the reverse; it preconditioned the validity of such a strike or picketing solely upon the absence of certification of another union. As a matter of deliberate choice, therefore, except for the narrowly defined activity regulated by Section 8(b)(4)(C), Congress left unrestricted the right of a labor organization to engage in a recognition strike or picketing.

This was fully recognized and endorsed by the Joint Committee on Labor Management Relations. This committee, in the discharge of its function to study and investigate "the administration and operation of existing Federal laws relating to labor relations" (Title IV, Sec. 402(7), Labor Management Relations Act, 1947), reported concerning strikes for recognition (Com. Print., Rep. No. 986, Part 3, 80th Cong., 2nd Sess., 70-71):

> Both the bills passed by the House of Representatives in 1947[8] and early committee versions of the

[8] H.R. 3020, 80th Cong., 1st Sess., Sec. 12(a)(3)(C)(ii), in 1 Leg. Hist. 205-206.

Senate bill[9] contained some form of prohibition against a strike for a purpose for which the act provided an administrative remedy. Such a provision would have prohibited a strike for recognition, since the labor organization has available the certification processes of the Board. *The Taft-Hartley law's only limitation upon such strikes is that provided by Section 8(b)(4)(C). The right to strike for recognition is only foreclosed when another labor organization has been certified as the bargaining representative.* (Emphasis supplied.)

A labor organization may lose an election in which it was the only union on the ballot and the next day call a legal strike to force the employer to recognize it as the bargaining agent for those employees who have just rejected it. A number of instances have just been called to the committee's attention (hearings, p. 267). (Emphasis supplied.)

Many labor organizations have enjoyed recognition by, and contracts with, employers without ever having been certified by the Board. The employers have not first required such unions to prove their majority status in an election conducted by the Board, being satisfied to rely upon a check of membership cards, dues records, or other proof that they were the choice of the majority of the employees. A union seeking to supplant one of these uncertified bargaining representatives may call a strike for such purpose without violating Section 8(b)(4)(C). This was the situation in the recent *Perry Norvel Co.*, Case (9-CB-3) [80 NLRB 225], in which an uncertified union held a contract with the employer and another union struck for bargaining rights.

Present law in no way limits the primary strike for recognition except in the face of another union's certification. It has frequently been suggested that Section 8(b)(4)(C) should be broadened to cover the situations where another union has been recognized, or has a contract, and where the striking union has failed to win recognition at the ballot box. A fairly good case can be made for such an amendment. It would not

[9] S. 360, 80th Cong., 1st Sess., Sec. 13(b)(2) (January 27, 1947).

go as far as the suggestion prohibiting strikes for purposes for which the law provides an administrative remedy, for the union seeking bargaining rights in an unorganized shop might still strike for it. (Emphasis supplied.)

There are two factors which might be considered in connection with any further restrictions upon recognition strikes. The first is the time element involved in acquiring bargaining rights by the orderly procedure provided by the act. If the employer will not consent to an election, it now requires an average of 84 days to dispose of a representation case (hearings, p. 1138). It may be questioned whether or not the mere availability of an administrative remedy is sufficient to restrict the right to strike. Perhaps the remedy should be prompt as well as available.

A second consideration arises out of the fact that Section 9(c)(3) limits elections to one in a given year. A labor organization which loses an election and strikes for recognition the next day or the next week may be condemned for such action, but there may be equities militating against it having to wait a whole year. The situation may arise where some action by the employer, or a more successful organizing campaign, causes the union to acquire an overwhelming majority within a few weeks following an election in which it has been rejected by the employees.

The committee believes that further experience with the act is advisable before consideration is given to broadening Section 8(b)(4)(C).

The report thus recognizes that (1) "Present law in no way limits the primary strike for recognition except in the face of another union's certification"; and (2) "A labor organization may lose an election in which it was the only union on the ballot and the next day call a *legal* strike to force the employer to recognize it as the bargaining agent for those employees who have just rejected it." (Emphasis supplied.)

There can be no question of the validity of the report of the Joint Committee as an authoritative expression of the

congressional purpose. The Supreme Court has relied upon it at least four times. *United Mine Workers* v. *Arkansas Oak Flooring Co.,* 351 U.S. 62, 75, n. 14; *N.L.R.B.* v. *Lion Oil Co.,* 352 U.S. 282, 288 and n. 5, and concurrence at 299-300; *Gus* v. *Utah Labor Relations Board,* 353 U.S. 1, 9, n. 15, and dissent at 14 and n. 3, 15, n. 7; *American Newspaper Publishers Association* v. *N.L.R.B.,* 345 U.S. 100, 108, n. 8. The Supreme Court has quoted with approval that report's observation that "Present law in no way limits the primary strike for recognition except in the face of another union's certification." *United Mine Workers* v. *Arkansas Oak Flooring Co., supra.* It has observed that "the Joint Committee of Congress [was] created by the very act" which is the subject of its report "to study the operation of the federal labor laws." *N.L.R.B.* v. *Lion Oil Co., supra.* The Court of Appeals for the Sixth Circuit, after careful consideration of the reasons for the creation of the Joint Committee and the circumstances of its operation (188 F. 2d at 921-924),[10] considered its report "illuminating" (*id.* at 921) and "persuasive evidence" (*id.* at 923) of congressional intent. *N.L.R.B.* v. *Wiltse,* 188 F. 2d 912, 921-924 (C.A. 6), cert. denied, 342 U.S. 859. See also *Herzog* v. *Parsons,* 181 F. 2d 781, 788 (C.A.D.C.), cert. denied, 340 U.S. 810.

The report of the Joint Committee closed with the observation that "The committee believes that further experience with the act is advisable before consideration is given to broadening Section 8(b)(4)(C)" (*supra,* p. 13). Thus far experience has not led Congress to enlarge its scope.

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[10] Among other things, the Sixth Circuit noted that (188 F. 2d at 923):

"Congress . . . was deeply concerned with the manner in which the amended Act would operate and, accordingly, . . . the Act provided for the Joint Congressional Committee to carry on a continuing thorough study and investigation of labor-management relations, including the administration of the federal laws relating to labor relations, with the object of reporting back to Congress the results of its investigation, together with recommendations for further legislation on the subject. Among the members of such Joint Congressional Committee, it is to be noted, were Senator Taft and Representative Hartley, authors and sponsors of the Labor-Management Relations Act which bore their name."

Indeed, in the 85th Congress which has just adjourned a strenuous effort was made and defeated to expand the prohibition of recognition picketing. And in virtually every Congress since the 80th Congress which passed Section 8(b)(4)(C) bills to broaden it have been introduced but unenacted.[11]

Thus, on January 23, 1958, President Eisenhower presented his message to the 85th Congress recommending new labor legislation. Included among his recommendations was a proposal to (41 LRRM 78, 81):

> Amend the Act to make it an unfair labor practice for a union, by picketing, to coerce an employer to recognize it as the bargaining representative of his employees or his employees to accept or designate it as their representative where:
>
> The employer has recognized in accordance with law another labor organization:
>
> The employees, within the last preceding twelve months, have rejected the union in a representative election; or
>
> It is otherwise clear that the employees do not desire the union as their bargaining representative.

Immediately following the President's message, S. 3099 (January 23, 1958), H.R. 10248 (January 23, 1958), and H.R. 10273 (January 27, 1958) were introduced, and Section 4 thereof provided that Section 8(b) of the Taft-Hartley Act be amended to make it an unfair labor practice for a labor organization or its agents:

> (1) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer with the object of forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative:

[11] We set these bills out in the Appendix, *infra*, pp. 60-61.

(A) where the employer has recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act, or

(B) where within the preceding 12 months a valid election under section 9(c) of this Act has been conducted, or

(C) where the labor organization cannot establish that there is a sufficient interest on the part of the employees in having such labor organization represent them for collective bargaining purposes, or

(D) where such picketing has been engaged in for a reasonable period of time and at the expiration of such period an election under section 9(c) has not been conducted.

In introducing S. 3099, Senator Smith explained with respect to this feature of it that (104 Daily Cong. Rec. 1137 (Jan. 30, 1958)):

> The bill would also amend the National Labor Relations Act so as, *for the first time,* to deal specifically with organizational and recognition picketing. Such picketing has been generally criticized and there are many who would prohibit it completely. The bill would not do this but it would restrict picketing to force organization or recognition to situations where the employees in question have evidenced sufficient interest in having the union as their bargaining representative and even then would permit it only for a reasonable period of time within which a representative election would have to be conducted. (Emphasis supplied.)

But the bill which reached the floor of the Senate for a vote, S. 3974 entitled "Labor-Management Reporting and Disclosure Act of 1958," did not contain the Administration's proposed restriction upon recognition picketing. And so on June 12, 1958, Senator Smith introduced an amendment to S. 3974 providing the identical limitation upon recognition picketing which he had theretofore intro-

duced as S. 3099 (quoted above). 104 Daily Cong. Rec. 9897-98 (June 12, 1958). This was number one of eighteen amendments then introduced by Senator Smith on behalf of the Administration to correct alleged defects in S. 3974. *Id.* at 9902. In describing the amendment pertaining to recognition picketing, Senator Smith stated (*id.* at 9898):

> The proposed amendment would restrict organizational or recognition picketing to those situations in which the union can show a sufficient interest on the part of the employees in being represented by it and would restrict the duration of such picketing to a reasonable period of time during which a representation election would have to be conducted to determine the employees' wishes as to a collective bargaining representative. The determination of sufficient interest and reasonable period of time would rest with the National Labor Relations Board.

But Senator Smith "decided not to bring up" this and other amendments "because of the obvious impossibility of their passage. These proposals of the administration will await further consideration at some future time." 104 Daily Cong. Rec. 10374 (June 17, 1958). In a statement of supplemental views, Senator Smith, together with Senators Goldwater, Purtell and Allott, noted that "We regret that no attempt was made to remedy the long-standing deficiencies and weaknesses in the present law. We refer to [among others] . . . organizational and recognitional picketing against the wishes of the employees. . . ." *Id.* at 10373. And in like tenor Senator Johnston stated, "But I think it is safe to say that Congress must in the future approach the questions of . . . organizational picketing among others. These have not settled to the satisfaction of anyone. At the present time, we probably do not have enough information to settle them to the satisfaction of anyone." *Id.* at 10374. The restriction upon recognition picketing having been rejected, S. 3974 then

passed the Senate (104 Daily Cong. Rec. 10381 (June 17, 1958)), but it failed of enactment when the House declined to suspend the rules to vote upon it (104 Daily Cong. Rec. 16817, 16841 (August 18, 1958)).[12]

It is thus evident that Congress remains now, as it was when it enacted Section 8(b)(4)(C) and as it has been in the interval, extremely tentative in coming to grips with the ramified problem of recognition picketing.[13] It is plain from the terms of Section 8(b)(4)(C), and from its history before and after its enactment, that Congress has been willing to commit itself only to the limited extent of prohibiting strikes and picketing by a union to compel its recognition when another union has been certified as the representative. Beyond this Congress as yet refuses to go. As Senator Johnston said, "I think it is safe to say that Congress must in the future approach the questions," but "At the present time we probably do not have enough information to settle them to the satisfaction of anyone." Nevertheless the Board interprets Section 8(b)(1)(A) to constitute a blanket prohibition of all picketing to secure the recognition of a union which does not represent a majority, and indeed it studiously refrains from holding that the prohibition does not also extend to organizational picketing (Bd. br. p. 28, n. 15, pp. 60-61). Thus Congress in its ignorance labors mightily to decide whether to enact into law a prohibition which according to the Board is already in effect. The truth of course is that the Board rushed in where Congress fears to tread. But it is Congress, not the Board, which is the lawmaker. Until Congress decides differently the law is that picketing for recognition is circumscribed only to the narrow extent defined by Section 8(b)(4)(C).

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[12] Aside from the measure described in the text, other bills pertaining to recognition picketing were introduced in the 85th Congress, and we set these out in the Appendix, *infra*, pp. 59-60.

[13] For an insight into how troubling the underlying policy considerations are pro and con, compare Cox, *Some Current Problems in Labor Law: An Appraisal*, 35 LRRM 48, 53-57, with Meltzer, *Recognition-Organizational Picketing and Right-to-Work Laws*, 9 Lab. L. Jour. 55.

B. Section 8(b)(1)(A), Unlike Section 8(b)(4)(C), Is Concerned With Means, Not End; Its Purpose Is to Assure That Unions Do Not Engage in Physical Force, or Threats of Force, or Economic Reprisal to Achieve Their Ends.

If Section 8(b)(4)(C) means what it says, then Section 8(b)(1)(A) cannot mean what the Board holds. The two indeed have separate functions which do not overlap. Section 8(b)(4) is concerned with the "end sought," with defining "proscribed objectives." *International Brotherhood of Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, 702; see also *id.* at 704. By Section 8(b)(1)(A), on the other hand, "Congress was aiming at means, not end." *Perry Norvell Co.*, 80 NLRB 225, 239. "By Section 8(b)(1)(A), Congress sought to fix the rules of the game, to insure that strikes and other organizational activities of employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force, or of economic reprisal." *Ibid.* When the Board interprets Section 8(b)(1)(A) to prohibit peaceful picketing, because its purpose is to secure the recognition of a minority union, it transforms Section 8(b)(1)(A) from a provision designed to curb picketing, when conducted by coercive means, into an instrument to curb picketing, however peaceful, because of the end it furthers. This fundamentally alters the function of Section 8(b)(1)(A) within the statutory scheme.

The Board objects, however, that Section 8(b)(1)(A) prohibits restraint and coercion of employees *simpliciter;* that peaceful picketing, if successful, causes an employer to lose business; that this loss operates also as economic pressure upon the employees who earn their livelihood from that business; and that peaceful picketing is therefore a coercive technique squarely within the "ordinary meaning" of the words "restrain or coerce" (Bd. br. p. 18). The obvious vice in the argument is that it engulfs all peaceful picketing whatever its purpose. For this consequence of picketing ensues regardless of the end it serves. The question-begging character of the argument has been

recently lucidly exposed by the Arizona Supreme Court (*International Brotherhood of Carpenters, Local 857* v. *Storms Construction Co.,* 324 P.2d 1002, 1005, 42 LRRM 2116, 2119):

> We recognize that the obvious result of picketing is the refusal of other union employees to cross the picket line and thereby curtail the delivery of material and supplies to plaintiff's building project. The economic effect of picketing is a matter of general knowledge. But the effect is the same whether the peaceful picketing is for a lawful or an unlawful object. Hence, proof alone of the economic effect of picketing on the employer is not sufficient as a matter of law to establish an unlawful object or purpose which the state can prohibit.

Neither is it a sufficient basis for the Board to act.

Nor is there any escape from the patent impossibility of the Board's interpretation—one which outlaws all peaceful picketing—by looking to that part of Section 8(b)(1)(A) which confines its operation to restraint and coercion of employees "in the exercise of the rights guaranteed in Section 7." For Section 7 guarantees the right to engage in and "to refrain from *any or all of*" union activity. There is virtually no union activity to which some employees are not opposed. Upon the Board's analysis of the coercive consequence of peaceful picketing, any picketing in furtherance of any union activity will inescapably restrain and coerce some employees in the exercise of their right to refrain from it. *National Maritime Union,* 78 NLRB 971, 986, enforced, 175 F.2d 686 (C.A. 2), cert. denied, 338 U.S. 954; *Perry Norvell Co.,* 80 NLRB 223, 240.

The Board recognizes the dilemma of its position. It seeks to extricate itself by saying that it will strike "a balance between practices inimical to the organizational freedom of employees" and the need for "protection of legitimate competing interests" (Bd. br. p. 27), and it

will not curb picketing if the restraint it exerts is "justified as necessary to the protection of a competing interest which the Act recognizes . . ." (Bd. br. p. 30; see *passim* pp. 26-30, 58-61). Thus the Board, starting from the comfort of "a clear and literal violation of Section 8(b)(1)(A)" (Bd. br. p. 58), quickly abandons it, because its reading clearly and literally prohibits all picketing. To make its escape the Board would arrogate to itself the role of social arbiter of what it is good or bad to picket for. And the escape the Board thus makes identifies the precise vice of its interpretation. For the balance the Board would strike Congress has already struck for itself. Congress has in Section 8(b)(4)(C) defined the exact extent to which it means to go in curbing picketing for recognition purposes. It has left no penumbral area which the Board is free to explore for itself. Instead, both before and after the enactment of Section 8(b)(4)(C), Congress has shown itself fully alert to the complete range of the problem, and it has as a matter of deliberate choice declined as yet to go beyond the point fixed by Section 8(b)(4)(C). That choice may be good, bad, or indifferent, but it is for Congress to make. "It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board's policy. . . . To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress." *Colgate-Palmolive-Peet Co.* v. *N.L.R.B.,* 338 U.S. 355, 363.

The Board is in this abyss soley because of its latter-day misinterpretation of the reach of Section 8(b)(1)(A). By reading that section as if it were concerned with ends, not means, the Board has now done what the opponents of Section 8(b)(1)(A) feared could be its consequence but what its proponents assured would not. Section 8(b)(1)(A) originated in the Senate and had no counterpart in that form in the House. After the Senate Labor Committee

by a closely divided vote rejected its inclusion in the bill it would report,[14] a minority stated it would offer on the Senate floor an amendment making it an unfair labor practice for a union "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[15] The thought behind the amendment was the "many instances of union coercion of employees such as that brought about by *threats of reprisal* against employees and their families in the course of organizing campaigns; also direct interference by *mass picketing and other violence.* * * * We believe that the freedom of the individual workman should be protected from duress by the union as well as duress by the employer"[16] (Emphasis supplied.)

The amendment was thereafter offered on the Senate floor by Senator Ball.[17] It met with much opposition.[18] To placate that opposition the words "interfere with" were expunged from the amendment by unanimous consent.[19] This was done to allay fear that, in derogation of "union organizational activities," the amendment could "be construed to mean that any conversation, any persuasion, any urging upon the part of any person to persuade another to join a labor organization, would constitute an unfair labor practice."[20]

Even as so restricted, it was charged that the amendment "would slow up the organizational activity of unions,"[21] that "it will have the effect of outlawing organi-

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14 S. Rep. No. 105, 80th Cong., 1st Sess., 50, in 1 Leg. Hist. 456; 93 Cong. Rec. 4435, in 2 Leg. Hist. 1204.

15 *Ibid.*

16 *Ibid.*

17 93 Cong. Rec. 4016, in 2 Leg. Hist. 1018.

18 93 Cong. Rec. 4016-4025, in 2 Leg. Hist. 1018-1033.

19 93 Cong. Rec. 4271, in 2 Leg. Hist. 1138-1139.

20 *Ibid.*

21 93 Cong. Rec. 4430, in 2 Leg. Hist. 1195.

zational strikes and strikes for recognition."[22] In answer to this charge a colloquy ensued between Senators Taft and Saltonstall which has every earmark of being the definitive summing up by its proponents of the reach of Section 8(b)(1)(A). Senator Saltonstall initiated the colloquy: "I would appreciate very much, in order to make the matter clear in my own mind, if . . . Senator [Taft] . . . would give an example of a restraint he would consider an unfair labor practice, an action which would not be a restraint, an action which would be coercion, and an action which would not be coercion, within the meaning of the words of the bill and the amendment."[23] Senator Taft began by stating his understanding of the reach of the existing section against employers:[24]

> . . . I understand the present section against employers has been used by the Board to prevent employers from making threats to employees to prevent them or dissuade them from joining a labor union. They may be threats to fire the man, of course, in the extreme case. They may be threats to reduce his wages, they may be threats to visit some kind of punishment on him within the plant if he undertakes to join a union. Those are the usual types of coercion which have been held to be a violation of the section on the part of the employers. In the case of employers, there have also been some cases of threats of violence. . . .

Senator Taft then explained the reach of the amendment against unions:[25]

> In the case of unions, in the first place, there might be a threat that if a man did not join, the union would raise the initiation fee to $300, and he would have to pay $300 to get in; or there might be a threat that if he did not join, the union would get a closed-shop

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[22] 93 Cong. Rec. 4431, in 2 Leg. Hist. 1197.

[23] 93 Cong. Rec. 4435, in 2 Leg. Hist. 1205.

[24] *Ibid.*

[25] 93 Cong. Rec. 4435-4436, in 2 Leg. Hist. 1205.

agreement and keep him from working at all. Then, there might be a threat of beating up his family or himself if he did not join and sign a card. I think, when we get to the case of unions, there might be the actually violent act of forcibly, by mass picketing, preventing a man from working.

Let us take the case of mass picketing, which absolutely prevents all the office force from going into the office of a plant. That would be a restraint and coercion against those employees, an interference with their right to work.

Senator Taft then summed up:[26]

The effect of the pending amendment is that the Board may call the union before them, exactly as it has called the employer, and say, "Here are the rules of the game. You must cease and desist from coercing and restraining the employees who want to work from going to work and earning the money which they are entitled to earn." The Board may say, "*You can persuade them; you can put up signs; you can conduct any form of propaganda you want to in order to persuade them*, but you cannot, by threat of force or threat of economic reprisal, prevent them from exercising their right to work." As I see it, that is the effect of the amendment. (Emphasis supplied.)

* * *

[The amendment] will slow up organizational drives only if they are accompanied by threats and coercion. The cease-and-desist order will be directed against the use of threats and coercion. *It will not be directed against the use of propaganda or the use of persuasion, or against the use of any of the other peaceful methods of organizing employees.* (Emphasis supplied.)

* * * It would outlaw threats against employees. It would not outlaw anybody striking who wanted to strike. It would not prevent anyone using the strike in a legitimate way, *conducting peaceful picketing, or employing persuasion.* (Emphasis supplied.)

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[26] 93 Cong. Rec. 4436, in 2 Leg. Hist. 1206, 1207.

In a later analysis, Senator Taft explained that the prohibitions of Section 8(b)(1)(A) "apply to *coercive acts* of unions against employees who do not wish to join or did not care to participate in a strike or a picket line";[27] and the "coercive conduct" against which the employee is protected is "physical and economic coercion. For example, in the absence of a valid compulsory union-membership contract if a union compelled a man to join it or to sign an application card by threatening him with loss of his job, this would be economic coercion. Both threats of violence and threats of this kind are prohibited. * * * [I]t will cover intimidating conduct or physical force used . . . [in] picketing. . . ."[28]

What clearly emerges from the debate is absolute affirmation that peaceful picketing is not comprehended within the concept of restraint and coercion. There is unequivocal assurance that "you can put up signs;" that none of the "peaceful methods of organizing employees" is affected; that no one would be prevented from "conducting peaceful picketing."[29] Indeed, the kind of picketing which does fall within the scope of Section 8(b)(1)(A)—mass or violent—denotes precisely the picketing which does not—peaceful. And on the face of Section 8(b)(1)(A) it would be an extraordinary interpretation of its words to find, as in this case, that it constituted restraint or coercion for a single picket to walk quietly up and down in front of an employer's premises carrying a sign.

Nor is there any substantial showing that it was thought that within the meaning of Section 8(b)(1)(A) peaceful picketing acquires the character of restraint or coercion because of the purpose it furthers. To be sure, the Board musters a few examples from an early stage of the debate

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[27] 93 Cong. Rec. 6859, in 2 Leg. Hist. 1623 (emphasis supplied).

[28] 93 Cong. Rec. A3369.

[29] In 1949 Senator Taft, together with Senators Smith and Donnell, labelled as "of course . . . untrue" the charge that Section 8(b)(1)(A) "forbids 'peaceful' picketing." S. Rep. No. 99, Pt. 2, 81st Cong., 1st Sess., 24.

which may tend to suggest this (Bd. br. pp. 24-26, 65-67). But each of these examples was tendered *prior* to the deletion of the words "interfere with" from Section 8(b)(1)(A). It may be that, viewed nakedly, the deletion is not substantial, but its true significance lies in its reflection of a marked change in mood.[30] For the earlier expansiveness in describing Section 8(b)(1)(A) was never again suggested after this change. For example, before the change, Senator Ball was strident in his claim that Section 8(b)(1)(A) would reach "false promises or false statements" by unions;[31] after the change, Senator Ball agreed that Section 8(b)(1)(A) does not reach "misrepresentation."[32] And, after the change, Senator Taft's authoritative explanation of Section 8(b)(1)(A) did not even intimate that peaceful picketing would come within its purview by virtue of its purpose. It is fair to say that, whatever ambitions its proponents may have had for Section 8(b)(1)(A) at the beginning, they quickly squelched them in favor of a more modest role, lest they fail to have any acceptance of it at all.

Nor is the Board's position helped by the much stressed circumstance that the Section 8(b)(1)(A) restriction upon unions parallels the Section 8(a)(1) restriction upon employers. Both employers and unions are subjected to a duty to the employees, and in that meaningful sense equality is established between them. But the duty may be different precisely because unions and employers are different in character, function, and history. "The same words, in different settings, may not mean the same thing."[33] Even before the deletion of the words "interfere with," Senator Taft recognized that interference, restraint, and coercion in application to labor organizations

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[30] *Cf. Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 487.

[31] 93 Cong. Rec. 4016, 4017, in 2 Leg. Hist. 1018-1019, 1020.

[32] 93 Cong. Rec. 4434, in 2 Leg. Hist. 1202.

[33] *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 678.

may have a "different implication. . . ."[34] And so, "Because Section 8(b)(1) was designed as the co-part of Section 8(a)(1), it does not follow that each and every rule established by the Board in cases involving employer interference, restraint, and coercion must mechanically be transposed to cases involving union restraint and coercion, with every 'i' dotted and every 't' crossed and without regard to whether or not the controlling principles are the same."[35] It is thus not "very significant that Section 8(b)(1) follows the familiar phraseology of Section 8(a)(1), although it omits the word 'interfere', or that its sponsors repeatedly explained that the new section would make it unfair for labor organizations to engage in activities which were unfair when engaged in by employers. While the Board's decisions under the older section may give some slight help in interpreting the new provision, it is clear that there are important differences." Cox, *Some Aspects of the Labor Management Relations Act, 1947,* 61 Harv. L. Rev. 1, 30-31 (1947).[36]

The upshot is that the insubstantial fragments upon which the Board relies cannot reasonably support the extravagant meaning it imputes to Section 8(b)(1)(A).[37]

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[34] 93 Cong. Rec. 4023, in 2 Leg. Hist. 1028.

[35] *International Typographical Union,* 86 NLRB 951, 1021, affirmed on this point, 193 F. 2d 782, 801, 806 (C.A. 7), cert. denied, 344 U.S. 812.

[36] The writer goes on to say: "For example, although an employer is forbidden to express the hope that he may be able to raise wages and improve working conditions if the union is defeated, the counter-argument made by labor organizations to secure union members—that if enough employees join the union it will be able to obtain additional advantages—is clearly legitimate. Nor would it seem to be improper for a union to promise economic advantages only to those who become members. Many unions offer mutual insurance, vacations, and similar benefits to members, in addition to what is obtained by collective bargaining, which surely they must be free to point out in seeking members. Much the same distinction is true of social pressures. While an employer may not segregate a union employee in order to hold him up to the ridicule of his fellows, it will scarcely be asserted that labor organizations are forbidden to ostracize nonmembers or to impose other social pressures upon them."

[37] The Board also contends that Section 9(c)(3) of the Act supports its interpretation of Section 8(b)(1)(A), the argument being that, as Section 9(c)(3) prohibits the Board's direction of a second election within one year of the Board's conduct of a valid election within the bargaining unit, the

Picketing is within 8(b)(1)(A) only to the extent of curbing its conduct by coercive means; if picketing is peaceful, 8(b)(1)(A) is indifferent to the end it serves. The implications of Section 8(b)(4)(C) are too plain, the restricted role of Section 8(b)(1)(A) too clear, for any other reading. The indirection which it is necessary to assume in order to reach the Board's result is "so far-fetched and forced as to bring into question the candor of Congress as well as the integrity of the interpretative process." [38] "Such an innovation is so radical and important that it would have been introduced explicitly, if intended. . . ." [39] If more were needed to show this, final confirmation is found in the material to which we now turn.

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policy of Section 9(c)(3) is subverted if a union may strike or picket for recognition during a period that the Board's election machinery is unavailable (Bd. br. p. 28, n. 14, p. 70). The argument proves too much. If it were valid, it would prohibit a recognition strike or picketing by a majority no less than a minority within one year of a previous election, for in either event the Board may not conduct an election during that time. No one suggests that this can possibly be true. *Ecko Products Co.*, 117 NLRB 137, 142-144. Furthermore, it is settled that the Board's election machinery exists as an alternative to, not in lieu of, self-help to secure recognition. *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62. Nothing in Section 9(c)(3) is designed to affect this fundamental premise. Its role is considerably more modest. Its purpose is to bring about a single change in the Board's pre-1947 electoral practice. Before 1947 the Board would entertain a petition of a defeated union for a second election within a year of the union's loss of a preceding election in substantially the same unit if it made "a showing of renewed and extended organizational efforts." *Borden Company*, 69 NLRB 947, 948, and cases cited at notes 4 and 7. See also, *J. C. Blair Co.*, 74 NLRB 408, 409. Critical of this practice (S. Rep. No. 105, 80th Cong., 1st Sess., 25, in 1 Leg. Hist 431), Congress enacted a blanket prohibition against the Board's conduct of a second election within a year of the first regardless of the petitioning union's new and improved showing of support obtained after the first election. The terms of Section 9(c)(3) do not express, and its purpose does not go beyond, any objective other than this narrow procedural limitation upon access to the Board's election machinery. Indeed, as the report of the Joint Committee states, the very fact that the Board's electoral processes are unavailable for a year after an election is itself a reason in favor of not prohibiting recognition strikes and picketing during that time, there being no other means by which the employees can compel recognition (*supra*, p. 13). Finally, the 85th Congress has just rejected a proposal to prohibit recognition strikes and picketing "where within the preceding 12 months a valid election under section 9(c) of this Act has been conducted" (*supra*, p. 16). The Board continues to attempt to outrun Congress.

[38] *Western Union Tel. Co.* v. *Lenroot*, 323 U.S. 490, 508.

[39] Cox, *op. cit. supra*, p. 27, at 28.

C. The Board's Construction of Section 8(b)(1)(A) Conflicts With Sections 8(c) and 13; It Reverses a Long-Standing Interpretation; and It Renders Section 8(b)(4)(C) Redundant.

1. *Section 8(c)*

When fear was expressed that Section 8(b)(1)(A) was capable of expansive interpretation, Senator Taft stated that Section 8(c) would guard against it, observing that "the provision regarding free speech applies both to employer and employee."[40] Section 8(c) provides that:

> The expressing of any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Peaceful picketing is plainly the "expressing" and "dissemination" of "views, argument, or opinion" "in written, printed, graphic, or visual form." "Peaceful picketing is the workingman's means of communication" (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287, 293); it is therefore "in part an exercise of the right of free speech guaranteed by the Federal Constitution" (*Building Service Union* v. *Gazzam*, 339 U.S. 532, 536-537). And unless it contains a "threat of reprisal or force or promise of benefit"—which *peaceful* picketing does not—Section 8(c) states that speech "shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act. . . ." Section 8(b)(1)(A)—one "of the provisions of this Act"—cannot therefore be held to embrace peaceful picketing.

The Board contends that *Electrical Workers* v. *N.L.R.B.*, 341 U.S. 694, "is conclusive" that Section 8(c) of the Act is "inapplicable to this case" (Bd. br. p. 39). Precisely the contrary is true. That case holds only that the "gen-

[40] 93 Cong. Rec. 4020, in 2 Leg. Hist. 1023.

eral terms of § 8(c) appropriately give way to the specific provisions of § 8(b)(4)" (341 U.S. at 705-706). This conclusion was reached upon consideration of the specific words of Section 8(b)(4)—making it an unfair labor practice "to *induce or encourage* the employees of any employer"—the place of Section 8(b)(4) in the statutory scheme, and the purpose it was designed to serve. And in reaching this conclusion the Supreme Court *contrasted* the breadth of Section 8(b)(4) with the restricted reach of Section 8(b)(1)(A).

Thus, the Supreme Court stated that "The intended breadth of the words 'induce or encourage' is emphasized by their contrast with the restricted phrases used in other parts of § 8(b). For example, the unfair labor practice described in § 8(b)(1) is one 'to restrain or coerce' employees. . ." (341 U.S. at 703). In addition, the Supreme Court observed that to read Section 8(c) into Section 8(b)(4) would *duplicate* the reach of Section 8(b)(1)(A), for it would then limit the type of inducement reached by Section 8(b)(4) to that containing a "threat of reprisal or force or promise of benefit," the very limitation written into Section 8(b)(1)(A). Said the Court (341 U.S. at 701-702):

> To exempt peaceful picketing from the condemnation of §8(b)(4)(A) as a means of bringing about a secondary boycott is contrary to the language and purpose of that section. The words "induce or encourage" are broad enough to include in them every form of influence and persuasion. There is no legislative history to justify an interpretation that Congress by those terms has limited its proscription of secondary boycotting to cases where the means of inducement or encouragement amount to a "threat of reprisal or force or promise of benefit." Such an interpretation would give more significance to the means used than to the end sought. If such were the case there would have been little need for § 8(b)(4) defining the proscribed objectives, because the use of "restraint and coercion"

for any purpose was prohibited in this whole field by §8(b)(1)(A).

Thus the Supreme Court stated in so many words that Section 8(b)(1)(A) does not reach peaceful picketing; that to give Section 8(b)(4) meaningful scope it was necessary to read it to go beyond Section 8(b)(1)(A) so as to reach peaceful picketing; and that the difference between Section 8(b)(4) and Section 8(b)(1)(A) was that in Section 8(b)(4) Congress intended to reach picketing because of its purpose. As the Supreme Court later highlightingly stated, quoting the Board, Congress was in Section 8(b)(4) concerned with "the *objective* . . . and not the *quality of the means* employed to accomplish that objective . . ." (341 U.S. at 704). The Court thus explicitly approved (341 U.S. at 702, n. 6, 703-704) the Board's approach articulated in *United Brotherhood of Carpenters,* 81 NLRB 802, 813, enforced, 184 F. 2d 60, 62 (C.A. 10), cert. denied, 341 U.S. 947:

> The lack of logic in importing Section 8(c) into Section 8(b)(4)(A) so as, in effect, to redefine inducement and encouragement of employees in terms of restraint and coercion is further cogently demonstrated by the fact that by so doing Section 8(b)(4)(A) in that respect would duplicate and reach the same conduct as Section 8(b)(1)(A), which makes it an unfair labor practice "to restrain or coerce" employees, except that Section 8(b)(4)(A) would require additional proof of object. As the Board has recently pointed out in the *Perry Norvell* case [80 NLRB 225, 239] "The legislative history [Section 8(b)(1)(A)] of the Act shows that, by this particular section, Congress primarily intended to proscribe the coercive conduct which sometimes accompanies a strike. . . By Section 8(b)(1)(A) Congress sought . . . to insure that strikes and other organizational activities of employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force or of economic reprisal. In that Section, Congress was aiming at *means, not ends.*" In these circumstances,

> we are unable to believe that Congress intended to do such a meaningless thing as to make conduct, which it had already prohibited in an earlier section in the statute (8(b)(1)(A)), an unfair labor practice in a later section (8(b)(4)(A)) conditioned, however, on further proof of unlawful objective. In the final analysis, it is plain from the different purposes these provisions were intended to serve in the statutory scheme that Congress contemplated that a broader scope be given to the phrase "induce or encourage" in Section 8(b)(4)(A) than to the phrase "restrain or coerce" in Section 8(b)(1)(A). By reading Section 8(c) into Section 8(b)(4)(A) this intention of Congress would be defeated.

Thus the Supreme Court's decision in *Electrical Workers* confirms the exemption of peaceful picketing from the reach of Section 8(b)(1)(A) and the applicability of Section 8(c) to quarantee its immunity.[41]

2. *Section 13.*

The Board's current interpretation of Section 8(b)(1)(A), in addition to conflicting with Section 8(c), is also at odds with Section 13. That section provides:

> Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere

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[41] *International Brotherhood of Teamsters* v. *Vogt*, 354 U.S. 284, and the cases it summarizes, do not detract from this view. The doctrine of these cases is relevant only to the power of Congress *constitutionally* to prohibit picketing for the purpose of securing the immediate recognition of a minority union. We do not doubt the power of Congress, but the question here is whether Congress has exercised the power, not whether it could. *Vogt* is not relevant to this question of statutory interpretation. That picketing is more than speech does not mean that it is not speech at all. As speech it is within Section 8(c). It is noteworthy that Section 8(c) was enacted in 1947. The Supreme Court's emphasis of the non-speech aspects of picketing began no earlier than 1949 with *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, and probably not until 1950 with *Hughes* v. *Superior Court*, 339 U.S. 460, and related cases (*International Brotherhood of Teamsters* v. *Hanke*, 339 U.S. 470; *Building Service Employers* v. *Gazzam*, 339 U.S. 532). The great likelihood is that Section 8(c) reflected the earlier emphasis upon the speech aspects of peaceful picketing. In any event, recognition of the non-speech aspects of picketing has not effaced its speech attributes, as the Supreme Court made clear in 1958 in *Chauffeurs, Teamsters & Helpers Local Union No. 795* v. *Newell*, 356 U.S. 341, in reaffirming *Thornhill* v. *Alabama*, 310 U.S. 88, 98, *Third*.

with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

As explained by the Supreme Court, "By § 13, Congress has made it clear that * * * all * * * parts of the Act which otherwise might be read so as to interfere with, impede or diminish the union's traditional right to strike, may be so read only if such interference, impediment, or diminution is 'specifically provided for' in the Act." *N.L.R.B.* v. *International Rice Milling Co.,* 341 U.S. 665, 673. There is nothing in Section 8(b)(1)(A) which "specifically" provides for the impairment of the right to strike and picket which the Board would effect. See *Mastro Plastics Corp.* v. *N.L.R.B.,* 350 U.S. 270, 284.

It is no answer to say, as the Board would (Bd. br. p. 61), that Section 13 applies to strikes, not picketing. If peaceful picketing constitutes restraint and coercion, obviously an actual strike *a fortiori* does, and it would be artful in the extreme to suggest that the Board's current holding does not condemn both when engaged in to secure the recognition of a minority union. Furthermore, little indeed would be left of the right to strike if the right to picket were not protected as an inseparable part of it (*Schultz Refrigerated Service, Inc.,* 87 NLRB 502, 504-505), and for that reason section 13 cloaks both (*Sales Drivers Union* v. *N.L.R.B.,* 229 F.2d 514, 517-518, cert. denied, 351 U.S. 972). Finally, by the very latitude of its language, Section 8(b)(1)(A) is precisely the sort of provision for which the tethering effect of Section 13 was designed.

3. *The Board's reversal of a long-standing interpretation.*

In 1948, after full consideration, the Board decided that the touchstone of illegality under Section 8(b)(1)(A) is, not the purpose to accomplish an "illegal objective," but

"the *means* by which it is accomplished. . . ." *National Maritime Union,* 78 NLRB 971, 986, enforced, 175 F.2d 686 (C.A. 2), cert. denied, 338 U.S. 954. And so the Board dismissed a complaint insofar as it alleged that, by a strike, picketing, and a wrongful refusal to bargain to secure an invalid hiring hall, the union violated Section 8(b)(1)(A) (*id.* at 982-987).[42] The same year the Board decided *Perry Norvell Co.,* 80 NLRB 224, in which, again after full consideration, the Board held that in Section 8(b)(1)(A) "Congress was aiming at means, not end" (*id.* at 239). It therefore dismissed a complaint insofar as it alleged that the union violated Section 8(b)(1)(A) by *inter alia* striking to compel the recognition of a minority union (*id.* at 238-241).[43] Until its abandonment in this and

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[42] The conduct was of course illegal under Sections 8(b)(2) and 8(b)(3) of the Act

[43] The Board would distinguish *Perry Norvell* upon the ground that it "did not involve picketing for exclusive recognition by a union that clearly did not represent a majority of the employees" (Bd. br. p. 71). As Member Murdock noted in his dissent in the *Curtis* case (Bd. br. p. 96, n. 46), "The Trial Examiner in this case [Curtis] points out, however, that the briefs in the *Perry Norvell* case and the Board's Fourteenth Annual Report, page 83, make clear that the strike in that case was by a minority group." The Trial Examiner in *Curtis* stated that (examiner's report, sl. op. p. 11):

> While the Board in the *Perry Norvell* decision did not explicate in so many words that the strike was one for recognition by a minority, it is noted that the briefs to the Board submitted by the General Counsel and counsel for Perry Norvell Company brought this fact to the Board's notice (General Counsel's brief, pp. 31, 32; Company's brief, pp. 62, 95). Indeed, the Board in its Fourteenth Annual Report submitted to Congress and to the President as provided in Section 3(c) of the Act, reporting among other things, the decisions it rendered, had the following to say (p. 83) regarding its *Perry Norvell* decision:
>
> > The Board also found no merit in the contention that a strike of a dissident group in violation of a no-strike clause,[23] and *non-violent attempts by a minority to unseat an incumbent union*[24] *constituted violations of Section 8(b)(1)(A).* [Emphasis supplied.]
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> [23] *Matter of Perry Norvell Company, supra.*
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> [24] *Ibid.*

The report of the Joint Committee on Labor Management Relations had equally no difficulty in recognizing the import of *Perry Norvell* (Com. Print., Report No. 986, Part 3, 80th Cong., 2nd Sess., 85):

> Another instance of a strike to force an employer to violate the law is a strike by a minority group of employees for recognition. It seeks to deprive employees of their rights under Section 7 of the Act. . . . If an

the companion *Curtis* case, the Board followed this interpretation without deviation.[44]

Thus late in 1957 the Board overturns an interpretation adopted in 1948, within a year of the effective date of the Taft-Hartley amendments in 1947, and undeviatingly adhered to for nine years. Applicable here is the Supreme Court's condemnation of the attempt of the Interstate Commerce Commission to displace an administrative application of the Interstate Commerce Act apparently less than ten years old. Said the Supreme Court, "It would be diffi-

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employer accedes to such demand, he participates in forcing his employees to bargain collectively through an agent to which a majority of them are opposed. That such a strike is not an unfair labor practice under the present act has been made clear. In *Matter of Perry Norvell*, (80 NLRB No. , 23 LRRM 1061, Nov. 12, 1948) the Board held that a *strike by a minority group for recognition, where another union was recognized agent, did not constitute "restraint or coercion" of the employees in violation of Section 8(b)(1)(A)*. In other words, the Board held that the strike did not restrain or coerce the employees in the exercise of their right to choose their own bargaining representative or to refrain from choosing one, although its object was to force them to choose an agent to which a majority of them were opposed. (Emphasis supplied.)

Finally, if there is any doubt as to the meaning of *Perry Norvell* on its face, there is none as to *Local 74, United Brotherhood of Carpenters*, 80 NLRB 533, enforced, 181 F. 2d 126 (C.A. 6), affirmed, 341 U.S. 707. *Local 74* was decided 12 days after *Perry Norvell*. In Local *74*, as the Supreme Court observed, the union picketed Watson's store, for the purpose of inducing Watson "to enter into a closed-shop agreement with the union recognizing it as the bargaining agent," although none of Watson's employees were members of the union. 341 U.S. 707, 709. The Board dismissed the complaint insofar as it alleged a violation of Section 8(b)(1)(A) by the conduct of the union in *inter alia* "peacefully picketing Watson's own store at a time when Local 74 represented none of its employees. . . ." 80 NLRB at 539. (The case reached the Supreme Court upon findings that by other conduct the union violated Section 8(b)(4)(A) of the Act.)

[44] Strikes and picketing to secure the recognition of a minority union: *Local 74, United Brotherhood of Carpenters*, 80 NLRB 533, 539, 546-549, enforced, 181 F. 2d 126 (C.A. 6), affirmed, 341 U.S. 707; *District 50, United Mine Workers*, 106 NLRB 903, 909.

Strikes, picketing, and other action to secure invalid hiring hall, union shop, or closed shop conditions: *International Typographical Union*, 86 NLRB 951, 957-959 and cases cited at 956, n. 15, specifically affirmed as to this point, 193 F. 2d 782, 801, 806 (C.A. 7), cert. denied, 344 U.S. 812; *United Mine Workers*, 83 NLRB 916, 917, n. 3, 937-938; *National Maritime Union*, 82 NLRB 1365, 1366; *American Radio Ass'n.*, 82 NLRB 1344, 1345.

Strikes, picketing, and other action to secure other objectives: *Painters' District Council No. 6*, 97 NLRB 654, 655, 666-668 (to cause withdrawal of decertification petition); *Miami Copper Co.*, 92 NLRB 322, 323-324, 340-341 (to cause employer to treat with minority union in adjusting grievances contrary to employees' right to treat through majority representative.)

The foregoing list does not purport to be exhaustive.

cult indeed to conceive a clearer case of uniform administrative construction. . .''; ''all doubt is removed by the application of the rule that settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons''; ''At this late date the courts ought not to uphold an application of the law contradictory of this settled administrative interpretation.'' *United States* v. *Chi. N. S. & Mil. R. Co.,* 288 U.S. 1, 13-14. See also, *Walling* v. *Halliburton Oil Well Cementing Co.,* 331 U.S. 17, 25-26; *United States* v. *South Buffalo Ry. Co.,* 333 U.S. 771, 774-775; *United States* v. *Ryan,* 284 U.S. 167, 174-175. This is peculiarly true here where the overturned interpretation involves a ''contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'' *United States* v. *American Trucking Assn's.,* 310 U.S. 534, 549, quoting from *Norwegian Nitrogen Co.* v. *United States,* 288 U.S. 294, 315.

4. *The redundancy of Section 8(b)(4)(C) on the Board's current interpretation of Section 8(b)(1)(A).*

Section 8(b)(4)(C) of the Act ''has no place in this Statute if Section 8(b)(1)(A) can be interpreted broadly to forbid picketing by a minority labor organization for recognition. For the type of picketing prohibited by Congress in Section 8(b)(4)(C) necessarily is in the category now forbidden under Section 8(b)(1)(A). Thus, through administrative interpretation of one provision, the specific language of another statutory provision in this Act has been reduced to a useless gesture.'' [45] We are therefore

[45] Member Fanning dissenting in *Paint, Varnish & Lacquer Makers Union, Local 1232,* 120 NLRB No. 89, sl. op. p. 10, 42 LRRM 1195, 1197. Upon the expiration of the term of Member Murdock, who dissented in this and the companion *Curtis* case, Member Fanning was appointed to succeed him. Not having participated in the earlier *Curtis* decision, Member Fanning considered his position on this issue *de novo,* and concluded that the Board's current interpretation of Section 8(b)(1)(A) was an impermissible construction.

required to conclude, if we are to accept the Board's current interpretation of Section 8(b)(1)(A), that Section 8(b)(4)(C) is an idle collection of words. That conclusion is impermissible. "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, section 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times. Another rule equally recognized, is, that every part of a statute must be construed in connection with the whole, so as to make all parts harmonize, if possible, and give meaning to each." *Washington Market Co.* v. *Hoffman,* 101 U.S. 112, 115-116.

To escape the force of this observation the Board brief makes three meritless arguments. We turn to these.

(a) The Board brief argues that Section 8(b)(4)(C) prohibits a *majority* union from striking or picketing for recognition, even if the incumbent union has only minority support, so long as the incumbent's certification as the representative remains formally unrevoked; whereas Section 8(b)(1)(A) prohibits only minority strikes or picketing for recognition (Bd. br. pp. 32-33). But the view that Section 8(b)(4)C) prohibits majority strikes or picketing for recognition in the face of an unrescinded certification of a minority union commands the assent of only two of the five members of the Board;[46] the Board itself has explicitly reserved decision upon this question;[47] and the

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[46] *Paint, Varnish & Lacquer Makers Union, Local 1232,* 120 NLRB No. 89, sl. op. p. 4, n. 5, 42 LRRM 1195, 1196, n. 5.

[47] *District 50, United Mine Workers,* 106 NLRB 903, 906. See also, *Warehouse & Distribution Workers Union, Local 688,* 116 NLRB 923, 924; *Local No. 224, Allied Industrial Workers,* 116 NLRB 890, 892.

question is an unsetlled and extremely troubling one.[48] Moreover, even if we accept the proposition stated in the Board brief, it hardly follows that this constitutes an adequate explanation of Section 8(b)(4)(C)'s reason for being. For, during the first year of its certification, a certified union is ordinarily conclusively deemed to possess majority status (*Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96), and thereafter it is presumptively deemed to possess majority status (*Celanese Corporation,* 95 NLRB 664, 672). It turns things upside down to find the true importance of Section 8(b)(4)(C), not in the protection it extends to the conclusive or presumptive majority status of the certified union, but in the supposed solicitude for the status of a minority union whose certification is formally unrevoked. "This suggested residue of utility left to 8(b)(4)(C) is . . . of little significance." [49]

(b) The second argument in the Board brief is this: for violations of Section 8(b)(4)(C), the temporary injunction procedures of Section 10(1) are applicable, whereas for violations of Section 8(b)(1)(A) those of Section 10(j) apply; that for violations within the purview of Section 10(l) the Board *must* seek a temporary injunction, while for those within 10(j) the Board *may* seek a temporary injunction; and that Congress differentiated between recognition strikes and picketing, placing those where another union was certified under Section 8(b)(4)(C) and others under Section 8(b)(1)(A), in order to make the 8(b)(4)(C) violation "subject to the mandatory injunction feature" (Bd. br. p. 34).

This is a truly extraordinary explanation. Tying it in with the first explanation in the Board brief, it means that

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[48] The view expressed in the Board brief is in conflict with *Kennedy* v. *Warehouse Workers Union, Local 688,* 37 LRRM 2496, 2499 (D.C.E.D. Mo.). Of the four cases cited in the Board's brief at p. 33, n. 19, we read only *Parks* v. *Atlanta Printing Pressmen,* 243 F. 2d 284 (C.A. 5), cert. denied, 354 U.S. 937, as square support for the position stated in the Board brief.

[49] Member Fanning dissenting in *Paint, Varnish & Lacquer Makers Union, Local 1232,* 120 NLRB No. 89, sl. op. p. 11, 42 LRRM 1195, 1198.

Congress intended it to be *mandatory* for the Board to seek a temporary injunction restraining *majority* strikes and picketing for recognition, if the incumbent was a minority union still possessing an unrevoked certification, but that Congress left it *discretionary* with the Board to seek a temporary injunction restaining *minority* strikes and picketing where no certified union was in the picture! The truth is that the separate temporary injunction procedures have nothing to do with defining the scope of the substantive wrong. As the Board explained in *Perry Norvell Co.*, 80 NLRB 225, 240:

> The General Counsel, to be sure, asserts that a strike for recognition in the face of an outstanding certification of another labor organization is an unfair labor practice also under Section 8(b)(1)(A), as well as under Section 8(b)(4)(C), and that the latter section is not thereby rendered redundant. He argues that its purpose is merely to insure the expeditious handling of, and the immediate application for appropriate injunctive relief against, recognition strikes in the face of an outstanding certification. However, Section 8 does not deal with remedy. It is devoted solely to defining unfair labor practices by employers and labor organizations. It is Section 10(1) that deals with special remedies in strike situations under Section 8(b)(4)(C). If Congress had really intended Section 8(b)(4)(C) to have primarily a procedural effect, it would surely have inserted its terms in Section 10, rather than in Section 8.

Indeed, it is plain on the face of Section 10(l) that when Congress truly sought a differentiation in remedy, it said so in the remedy section, not by indirection in the substantive section. Section 8(b)(4) defines four substantive violations, (A), (B), (C), and (D). With respect to the first three, Section 10(l) specifies the procedure to be followed "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4(A), (B), or (C) of section 8(b)," including

a mandatory application for a temporary injunction if there is reasonable cause to believe that a violation has been committed. The concluding sentence of Section 10(l) then reads: "In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D)." Thus, when Congress sought to make an application for a temporary injunction discretionary where, unlike subdivisions (A), (B), or (C), a subdivision (D) violation was charged, it expressed its purpose in the remedy section. It did not remove subdivision (D) from its position in Section 8(b)(4) and place it elsewhere in section 8(b). Neither did it insert subdivision (C) into Section 8(b)(4) in order to achieve a procedural end.

(c) Another argument in the Board brief is that, "in particularizing in some of the later subsections of 8(b) conduct that is also covered by the more general language of 8(b)(1)(A), Congress was only following the established pattern of draftsmanship employed in Section 8(a), where subsequent subsections deal with specific forms of employer restraint and coercion prohibited in Section 8(a)(1)." (Bd. br. pp. 33-34.) This is the sort of uncritical paralleling of Section 8(a)(1) and Section 8(b)(1)(A) which we have already discussed (*supra,* pp. 26-27). As the Court of Appeals for the Seventh Circuit held, "Nor can we agree with the contention . . . that a violation of other subsections of 8(b) are also necessarily violations of § 8(b)(1)(A) in the same manner that violations of other subsections of § 8(a) have been held to be violations of § 8(a)(1)." *American Newspaper Publishers Ass'n.* v. *N.L.R.B.,* 193 F.2d 782, 801, cert. denied, 344 U.S. 812. For, "it is clear from the wording of § 8(b)(1)(A) that it is not a general clause which also prohibits the unfair labor practices described in subsequent paragraphs of subsection 8(b)." *Id.* at 806.

D. The Board's Current Approach Overlooks the Compromise Character of the Taft-Hartley Amendments to the National Labor Relations Act.

In concluding that Section 8(b)(1)(A) prohibits picketing to secure the recognition of a minority union, as with its other conclusions to which we presently turn, the Board has overlooked a vital element of the legislative process. "Legislation is often tentative, beginning with the most obvious case, and not going beyond it, or to the full length of the principle upon which its acts must be justified." Mr. Justice Holmes in *Beard* v. *Boston,* 151 Mass. 96, 97, 23 N.E. 826, 827. It is this "cautious advance, step by step, and the distrust of generalities which sometimes have been the weakness, but often the strength, of English legislation." *Carroll* v. *Greenwich Insurance Co.,* 199 U.S. 401, 411. This approach is characteristic of the Taft-Hartley amendments to the National Labor Relations Act. "It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests. This is relevant in that it counsels wariness in finding by construction a broad policy . . . as such when, from the words of the statute itself, it is clear that those interested in just such a condemnation were unable to secure its embodiment in enacted law." *Local 1976, United Brotherhood of Carpenters* v. *N.L.R.B.,* 357 U.S. 93, 99-100. And so, in "a matter of such bitter controversy as the Taft-Hartley Act, the product of careful legislative drafting and compromise beyond which its protagonists either way could not force the main body of legislators, the courts should proceed cautiously." *Rabouin* v. *N.L.R.B.,* 195 F. 2d 906, 912 (C.A. 2). The Board in this case has isolated

a single principle, pushed it to a logical extreme, and reached a determination which Congress, fully aware of the whole range of the problem and the opposing claims and interests with which it bristles, has deliberately refrained from embracing. It is no part of the function of the Board to be "a super-Congress." [50]

II. AN APPEAL TO CUSTOMERS NOT TO PATRONIZE AN EMPLOYER AND A REQUEST TO PLACE THAT EMPLOYER ON A "WE DO NOT PATRONIZE" LIST, IN ORDER TO SECURE THAT EMPLOYER'S RECOGNITION OF A MINORITY UNION, IS NOT A VIOLATION OF SECTION 8(b)(1)(A).

We have shown that picketing to secure the recognition of a minority union is not a violation of Section 8(b)(1)(A). It follows that it cannot be a violation to appeal to customers not to patronize the employer, or to request that the employer be placed on a "We Do Not Patronize" list, in order to influence his recognition of a minority union. But even if picketing for that purpose is a violation, the customer appeals and the "We Do Not Patronize" list

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[50] *N.L.R.B.* v. *National Maritime Union*, 175 F. 2d 686, 691 (C.A. 2), cert. denied, 338 U.S. 954.

We recognize, of course, that this Court's opinion in *Capital Service, Inc.* v. *N.L.R.B.*, 204 F. 2d 848, 851-853, affirmed without reaching this question, 347 U.S. 501, contains statements inconsistent with the position we advance. We do not think these should control. (1) The issue arose in *Capital Service* in the context of determining whether certain activity which the state court undertook to regulate was preempted by the federal statute. To find preemption it is necessary only to determine that the conduct in controversy may *reasonably* be deemed to be within the purview of the national act. *Weber* v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 478-479, 480, 481; *Aetna Freight Lines* v. *Clayton*, 228 F. 2d 385, 388 (C.A. 2), cert. denied, 351 U.S. 950. Since this Court's holding that the conduct was preempted requires no more than a determination that the activity is reasonably cognizable as an unfair labor practice, the decision does not commit the Court on the merits of the unfair labor practice question. (2) In its petition for rehearing in *Capital Service*, the Board observed that this Court reached its conclusions as to the scope of Section 8(b)(1)(A) without benefit of briefs or argument on the issue (pp. 1-3), and the petition itself did little more than to adumbrate the relevant considerations. It is fair to say that, not until this case, has the Court been presented with a full canvassing of either side of the issue. We therefore venture to suggest that if the Court is otherwise disposed to accept our position, *Capital Service* should not stand in the way. (3) *Capital Service* is factually distinguishable. It pertained to picketing the premises of the customers of the employer from whom the union sought recognition. It did not, as here, concern picketing of the employer's own premises. To enjoin such picketing is a distinct advance beyond *Capital Service*.

are not. Congress has not authorized, the Constitution would forbid, condemnation of these means.

A. Congress Has Not Authorized Condemnation of Customer Appeals or the "We Do Not Patronize" List.

We begin with the direct appeals to customers not to patronize the employer who declines to recognize the minority union. Again our starting point is a provision of the statute which deals explicitly with the subject. Section 8(b)(4)(B) makes it an unfair labor practice for a labor organization or its agents to engage in, or to induce or encourage the employees of "any employer" to engage in, a strike or a concerted refusal to work, "where an object thereof is":

> forcing or requiring any *other* employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9. (Emphasis supplied.)

In this case Alloy's customers are "any employer"; Alloy is "any other employer." And Section 8(b)(4)(B) defines precisely the action to which Alloy's customers—"any employer"—may not be subjected "where an object thereof" is "forcing or requiring" Alloy—"any other employer"—"to recognize or bargain with a labor organization as the representative of his employees. . . ." The proscribed action is to call a strike among the employees of Alloy's customers or to induce or encourage them to strike.[51] But except as a strike of their *employees* is called, or their *employees* are induced to strike, Section 8(b)(4)

[51] This action is, however, permissible if, in the statutory language, the labor organization whose recognition is sought "has been certified as the representative. . . ." S. Rep. No. 105, 80th Cong., 1st Sess., 22, in 1 Leg. Hist. 428; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 43, in 1 Leg. Hist. 547; *DiGiorgio Fruit Corp.*, 87 NLRB 720, 748-749, affirmed, 191 F. 2d 642 (C.A.D.C.), cert. denied, 342 U.S. 869; *Sailors' Union of the Pacific*, 92 NLRB 547, 568-569.

(B) prohibits no other means of influencing conduct by Alloy's customers.[52] And so, as the Supreme Court has held, "a union is free to approach an employer to persuade him to engage in a boycott, so long as it refrains from the specifically prohibited means of coercion through inducement of employees." *Local 1976, United Brotherhood of Carpenters* v. *N.L.R.B.*, 357 U.S. 93, 99.

That is all that happened in this case when the Union appealed to several of Alloy's customers not to patronize Alloy. It simply exercised its freedom "to approach an employer to persuade him to engage in a boycott. . . ." This is precisely what Section 8(b)(4)(B) allows; for when it defines what a union may not do, it equally declares what a union may do, to force or require "any other employer to recognize or bargain with a labor organization. . . ." See *Garner* v. *Teamsters Union,* 346 U.S. 485, 499-500; *N.L.R.B.* v. *Local 50, Bakery & Confectionary Workers Union,* 245 F. 2d 542, 548 (C.A. 2). It is not a possible interpretation to say that what Congress allowed under Section 8(b)(4)(B) it just as promptly disallowed under Section 8(b)(1)(A).

The "We Do Not Patronize" list is in the same class. All that the Union did was to request the Spokane Central Labor Council to place Alloy on the list. The list was published in the "Labor World," the Council's periodic publication. The consequence of the Council's agreement to list Alloy was to appeal to those among whom the publication circulated not to buy Alloy's products. The published list differs from the direct customer appeals only in that it reaches a different part of the consuming public and the medium of appeal is written rather than spoken.

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[52] *Rabouin* v. *N.L.R.B.*, 195 F. 2d 906, 911 (C.A. 2); *N.L.R.B.* v. *Business Machine and Office Appliance Mechanics*, 228 F. 2d 553, 559 (C.A. 2), cert. denied, 351 U.S. 962; *Peter D. Furness*, 117 NLRB 437, 459, enforced, 254 F. 2d 221 (C.A. 3); *Arkansas Express, Inc.*, 92 NLRB 254, 265; *Santa Ana Lumber Co.*, 87 NLRB 937, 941-942. This settled interpretation was pioneered by this Court in *Schatte* v. *International Alliance*, 182 F. 2d 158, 165 (C.A. 9), cert. denied, 340 U.S. 827.

Like the direct appeal, it violates no provision of the Act. The Board has uniformly held that "a general public appeal for a consumer boycott" does "not violate the Act." [53] So have the courts.[54] And the Supreme Court's recent decision in *Local 1976, United Brotherhood of Carpenters* v. *N.L.R.B.*, 357 U.S. 93, 98-101, is complete confirmation. As Senator Taft stated in a question-and-answer explanation inserted in the Congressional Record (93 Cong. Rec. A3370):

> Question. Suppose the union, instead of refusing to handle his [the nonunion employer's] goods in other plants, urges the general public not to buy products of nonunion manufacturers?
> Answer. This is not forbidden by the act, since it is merely persuasion.

We do not understand the alchemy by which the Board, in order to bring the consumer appeals within the Board's engulfing concept of Section 8(b)(1)(A), converts this persuasion into the Union's utilization of "economic power" (R. 22). The Union exerts no economic power over the readers of the Labor World or the customers to whom it appeals directly. If the consumers are persuaded not to buy Alloy's products, it is much more logical to speak of the consumers' exercise of their economic power. But the Act does not illegalize their withholding of patronage, and it is as licit for the Union to persuade them to do so.

Here indeed is the minimum basis for the application of Secton 8(c) of the Act if it is to extend any meaningful protection to labor organizations. For surely the customer appeals and the "We Do Not Patronize" list are

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[53] *United Brewery Workers*, 121 NLRB No. 35, sl. op. p. 8, 42 LRRM 1350, 1353. See also, *Dallas General Drivers*, 118 NLRB 1251, 1254-1255; *Consolidated Frame Co.*, 91 NLRB 1295, 1299.

[54] *N.L.R.B.* v. *Business Machine and Office Appliance Mechanics*, 228 F. 2d 553, 559-561 (C.A. 2), cert. denied, 351 U.S. 962; *Douds* v. *Local 50, Bakery & Confectionary Workers Union*, 224 F.2d 49, 51, n. 4 (C.A. 2); *N.L.R.B.* v. *Crowley's Milk Co.*, 208 F. 2d 444, 446-447 (C.A. 3), enforcing, 102 NLRB 996, 998; *N.L.R.B.* v. *Service Trade Chauffeurs*, 191 F. 2d 65, 68 C.A. 2); *Getreu* v. *Hatters Union*, 41 LRRM 2429 (D.C.W.D. Ky.)

in pure form the "expressing" and "dissemination" of "views, argument, or opinion," which are not to "constitute or be evidence of an unfair labor practice under any of the provisions of this Act. . . ." As the Supreme Court has said, "A boycott voluntarily engaged in by a secondary employer for his own business reasons, perhaps because the unionization of other employers will protect his competitive position or because he identifies his own interests with those of his employees and their union, is not covered by the statute." *Local 1976, United Brotherhood of Carpenters* v. *N.L.R.B.*, 357 U.S. 93, 98-99. The least that Section 8(c) can mean is to safeguard a union's right to attempt to persuade an employer to identify his interests with its. The same is true of every other element of the consumer public. The Union cannot be less free to urge customers not to buy the product of a nonunion firm than that firm is free to urge the public to patronize it despite its nonunion status.

The merest adumbration of these considerations, which we elaborate hereafter, discloses why Congress in Section 8(b)(4) restricted the means it prohibited to strikes and inducements to strike, and why it made assurance doubly certain by adopting Section 8(c). Congress did not at the same time unlid Pandora's box by enacting the Board's freewheeling concept of Section 8(b)(1)(A). As we presently show, had Congress indeed intended to prohibit customer appeals and publication of "We Do Not Patronize" lists, the enactment could not survive the Constitution's guarantee of freedom of speech and press. At the least the doubts are grave. This is relevant to the question of statutory interpretation. For it is elementary that that interpretation is to be adopted which avoids constitutional doubts.[55]

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[55] *United States* v. *Rumely*, 345 U.S. 41, 45-46; *Peters* v. *Hobby*, 349 U.S. 331, 338; *United States ex rel. Attorney General* v. *Del. & Hudson Co.*, 213 U.S. 366, 407-408.

B. The Constitutional Protection of Freedom of Expression Prohibits Condemnation of Customer Appeals and the "We Do Not Patronize" List.

The Board would avoid the constitutional objection to prohibiting customer appeals and the "We Do Not Patronize" list by assimilating them to picketing (R. 22-23). "This is to make situations that are different appear the same."[56] The prohibition of picketing upon the basis of standards less rigorous than those applicable to pure speech is permissible precisely because it differs from "Publication in a newspaper, or by distribution of circulars. . . ." *Hughes* v. *Superior Court,* 339 U.S. 460, 465. For picketing does "exert influences, and it produces consequences, different from other modes of communication," and the responses it evokes "are unlike those flowing from appeals by printed word." *Ibid.* There is therefore no constitutional compulsion to place picketing "on a par" with other means of publicity. *International Brotherhood of Teamsters* v. *Hanke,* 339 U.S. 470, 476-477. But to converse with a customer to persuade him not to buy is pure speech. And to request the Labor Council to put Alloy on the "We Do Not Patronize" list, which is published in and circulated among the readers of "Labor World," is indistinguishable from placing an advertisement in a newspaper. We deal therefore with pristine expression. Having downgraded the constitutional protection of picketing because of "the ingredients in it that differentiate it from speech" (*Hughes* v. *Superior Court,* 339 U.S. 460, 465), it is not possible now to downgrade speech in order to justify its prohibition on the basis of the lesser standards applicable to picketing.

Since we deal with pure expression, it is relevant to remind that "only considerations of the greatest urgency can justify restrictions on speech. . . ." *Speiser* v. *Randall,* 357 U.S. 513, 521. "The question in every case is whether the words used are used in such circumstances and are of

[56] *Ray Brooks* v. *N.L.R.B.,* 348 U.S. 96, 104.

such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck* v. *United States,* 249 U.S. 47, 52. Or, as restated, "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Dennis* v. *United States*, 341 U.S. 494, 510.

The Board brief would meet the issue by defining the substantive evil to be immediate recognition of a minority union, and by arguing that, as achievement of this end is the objective of the customer appeals and the "We Do Not Patronize" list, they are beyond the constitutional pale because they incite disobedience of law (Bd. br. pp. 37-39). The argument rushes to its conclusion too fast. There is no disobedience of law incited. It is entirely legal for the customers to whom the appeal is addressed to withhold their patronage from Alloy. The persuasion directed to them to do so seeks of them nothing but their performance of a lawful act. Since the act induced is lawful it is not possible to justify abridgment of speech on the ground that it counsels violation of law. And illegal action aside, freedom of expression safeguards "the opportunity to persuade to action, not merely to describe facts." *Thomas* v. *Collins,* 323 U.S. 516, 537.

Furthermore, even if an ultimate consequence of successful consumer resistance to buying Alloy's products may be to induce Alloy to recognize the Union while it still does not have a majority, this does not establish a valid basis for prohibiting the customer appeals and the "We Do Not Patronize list, nor does it denigrate the obvious unimpeachable end that such persuasion does serve. That end is avowedly "to use every means possible to inform the public that the Alloy Manufacturing Company do[es] not employ union help and that the existing conditions governing employment are unfair to organized labor" (R.

37-38; 130). That Alloy and its employees may prefer to remain nonunion does not detract from the threat to the welfare of organized labor that the firm's nonunion status exerts. "Unions obviously are concerned not to have union standards undermined by non-union shops." *International Brotherhood of Teamsters* v. *Hanke,* 339 U.S. 470, 475. "The interdependence of economic interest of all engaged in the same industry has become a commonplace." *American Federation of Labor* v. *Swing,* 312 U.S. 321, 326. For union organization to be "at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because, in the competition between employers, they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership, and especially among those whose labor at lower wages will injure their whole guild." *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U.S. 184, 209. And since, "in order to render a labor combination effective it must eliminate the competition from non-union made goods . . ., an elimination of price competition based on differences in labor standards is the objective of any national labor organization." *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 503. Indeed, the policy of the National Labor Relations Act is based on explicit recognition that an evil against which the statute is directed is "preventing the stabilization of competitive wage rates and working conditions within and between industries" (Sec. 1, para. 2).

Thus, when a union publicizes the nonunion status of a firm, and urges consumers not to buy its products, it is exercising its freedom of expression to support a valid economic interest. The Union is as free to communicate Alloy's nonunion status to consumers as Alloy is free to urge those same consumers that this is not a consideration

which should deter them from buying Alloy's products. It is for the community of consumers in which Alloy and the Union both operate to decide on which side the consumer chooses to align himself. As the trial examiner properly observed in this case, "It is true that business operations employing union labor will be preferred by some customers and avoided by others upon the basis of that factor" (R. 44). The only meaning of free speech is that Alloy and the Union may both seek their customer support by appealing for it. That may mean that, if the Union's propaganda wins enough adherents among the consumers, the business pinch that Alloy and its employees may then feel may cause them to reconsider the wisdom of their nonunion preference. The employees may choose, and Alloy is free to persuade them to choose, union representation. If the employees prefer retention of their non-union status to alleviation of the pinch, that too is their right, but it is just as much the right of the Union to continue to persuade the consumers to shun the nonunion product. Unless free speech is a cloistered concept, again its only real meaning is that each element of the population is free to exercise it to win the support of others. There is in our society no escape for anyone, consistent with constitutional protection for all, from the interacting influence of the different reactions of different elements of our reticulated community.

The point can be illustrated by an example about which there should be no doubt. Labor organizations commonly conduct campaigns urging consumers to buy union-made goods, whether these be hats, suits, or preglazed sash. The necessary consequence of success is to reduce the purchase of nonunion goods, with consequent economic pinch of nonunion firms. Would anyone suggest that union propaganda to purchase union-made goods can be prohibited? There is no constitutional difference between the example and this case. Persuasion to purchase union-made goods is neces-

sarily persuasion not to purchase nonunion goods, and the only added feature in this case is that the customer appeals and the "We Do Not Patronize" list identified the specific nonunion firm. The difference hardly supports suppression of speech. Communication by "employees of the facts of a dispute, deemed by them to be relevant to their interests, can[not] . . . be barred because of concern for the economic interests against which they are seeking to enlist public opinion. . . ." *American Federation of Labor* v. *Swing,* 312 U.S. 321, 326. It is noteworthy that, in sanctioning the prohibition of picketing in *International Brotherhood of Teamsters* v. *Hanke,* 339 U.S. 470, the Supreme Court observed that the permitted restraint left "all other channels of communication open to the union" (*id.* at 477). Similarly, in sanctioning the restriction of picketing in *Carpenters & Joiners Union of America* v. *Ritter's Cafe,* 315 U.S. 722, the Supreme Court observed that it "leaves open to the disputants other traditional modes of communication" (*id.* at 728). And the prohibition of picketing sanctioned in *Building Service Employers Union* v. *Gazzam,* 339 U.S. 532, did not disturb the employer's placement on a "We Do Not Patronize" list (*id.* at 534). The "publication, unaccompanied by violence, of a notice that the employer is unfair to organized labor and requesting the public not to patronize him is an exercise of the right of free speech guaranteed by the First Amendment which cannot be made unlawful by act of Congress." Mr. Justice Stone concurring in *U.S.* v. *Hutcheson,* 312 U.S. 219, 243.

Finally, even if it were possible to identify a substantive evil, there is no showing that the customer appeals and the "We Do Not Patronize" list have that immediacy which would justify their suppression as a clear and present danger. There is no finding, nor evidence that would support a finding, that the evil apprehended is capable of imminent realization because of the speech. On the

contrary, despite the concomitant picketing, Alloy refrained from recognizing the Union although the customer appeals and the "We Do Not Patronize" list had been in being for a year. Furthermore, the "We Do Not Patronize" list is circulated among the readers of the "Labor World." Since that is a labor publication, it is fair to infer that its readers are principally workers. Alloy manufactures truck bodies, semi-trailers and similar products (R. 36; 8-9, 13). We find it hard to imagine that among a consumer class made up of workers Alloy runs much risk of impairment of its market for truck bodies, semi-trailers and similar products. This leaves the direct appeals to Alloy's customers. But there was no showing by reliable evidence—comparative profit and loss statements, sales volume, or individual customer ledger sheets—of any diminution of business. At most there may have been irksome inconvenience to Alloy in the operation of its business, but the least hospitable view of the protection enjoyed by freedom of expression could not find in this the proximity of danger, the gravity of evil, and the necessity of suppression which would alone justify prohibition of the Union's customer appeals and its request to place Alloy on the "We Do Not Patronize" list.

III. EXCEPT FOR THE FINDING THAT THE UNION VIOLATED SECTION 8(b)(2) OF THE ACT BY PICKETING TO SECURE A UNION SHOP AGREEMENT WHEN IT HAD NO MAJORITY, THE REMAINING BASES UPON WHICH THE BOARD FOUND STATUTORY VIOLATIONS ON THE UNION'S PART ARE WITHOUT MERIT.

We turn now to the remaining bases upon which the Board would find statutory violations on the Union's part.

1. The Board found that the Union's "picketing activity aimed at winning a union shop from Alloy Company despite the Union's minority status constituted a violation of Section 8(b)(2) of the Act" (R. 19-20, 42-43). We agree that an insistent demand for a union shop agree-

ment, backed by picketing to support it, when a union does not represent a majority, is a violation of Section 8(b)(2) of the Act, in that it is an "attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)...." [57] We read the Board's findings to amount to this (R. 36-39), and we agree that there is substantial evidence to support the findings. We therefore acquiesce in the entry of a decree enforcing the Board's order insofar as it requires the Union to cease and desist from "Attempting to cause Alloy, by means of picketing . . ., to discriminate against Alloy's employees in violation of Section 8(a)(3) of the Act" (R. 25).[58]

2. This conduct—picketing to back an insistent demand for entry into an invalid union shop agreement—although it supports a finding of a violation of Section 8(b)(2), does not, contrary to the Board (R. 20), furnish an independent basis for finding a violation of Section 8(b)(1)(A). The Court of Appeals for the Seventh Circuit has explicitly so held,[59] affirming the Board's determination in this respect,[60]

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[57] *Garner* v. *Teamsters Union*, 346 U.S. 485, may properly be cited to support the conclusion that picketing to secure entry into an invalid union shop agreement, because it constitutes an attempt to cause discrimination in employment, violates Section 8(b)(2) of the Act. But the Board's mistaken reliance on *Garner* to show that picketing to secure the recognition of a minority union violates Section 8(b)(1)(A) is amply exposed in Board Member Murdock's dissent in *Curtis* (Bd. br. pp. 97-98). It is noteworthy that the Board brief does not cite *Garner* to support an 8(b)(1)(A) violation.

[58] The deletion indicated by the ellipsis omits from the order the phrase "or by threatening to divert business from Alloy." This part of the order is improper. It is based on the subsidiary finding that, "in urging Alloy to recognize it and to sign the contract, the . . . [Union] threatened that failure to do so would result in action to persuade suppliers, customers, and transporters no longer to do business with Alloy" (R. 39). As we have shown, however, it was lawful for the Union to appeal to customers not to patronize Alloy. That is all that is comprised in the so-called threat to divert business from Alloy. "Ordinarily, what you may do without liability you may threaten to do without liability." Mr. Justice Holmes in *Silsbee* v. *Weber*, 171 Mass. 379, 380. "How then can it be said that a warning [by the Union] of what . . . [it] had a right to do, without notice, constituted an unfair labor practice?" *Kansas Milling Co.* v. *N.L.R.B.*, 185 F. 2d 413, 420 (C.A. 10).

[59] *American Newspaper Publishers Association* v *N.L.R.B.*, 193 F. 2d 782, 801, 806 (C.A. 7), cert. denied, 344 U.S. 812.

[60] *International Typographical Union*, 86 NLRB 951 957.

the Board having reversed the examiner's contrary conclusion.[61] This has been the uniform course of interpretation until discarded in this case (*supra*, pp. 33-35, and n. 44, ¶2. The only basis for the present about-face advanced by the Board is that "Concession by an employer of a union shop agreement to a union necessarily presupposes recognition of that union as the exclusive representative of all the employees, and [the] . . . same underlying considerations . . . leading to the conclusion that picketing for exclusive recognition restrains and coerces within the meaning of Section 8(b)(1)(A), apply with equal force to picketing by a minority union for purposes of obtaining a union shop agreement" (R. 20). As we have shown, picketing to secure the recognition of a minority union is not a violation of Section 8(b)(1)(A). Since the premise of the Board's argument falls, the argument falls with it. Furthermore, since full relief from picketing to secure entry into a union shop agreement with a minority union is secured through the avenue of Section 8(b)(2), it is pointless to warp the interpretation of Section 8(b)(1)(A) to achieve a result which is academic only.

3. There remains the question whether, insofar as a purpose of the Union was to secure entry into a union shop agreement when it had no majority, this added feature justifies the Board's conclusion that for this reason the customer appeals and the "We Do Not Patronize" list violate both Section 8(b)(1)(A) and 8(b)((2) (R. 52). For the purpose of Section 8(b)(1)(A) entry into a union shop agreement with a minority union adds nothing to recognition of a minority union. Since the latter does not furnish a basis for finding that the customer appeals and the "We Do Not Patronize" list violate Section 8(b)(1)(A), neither does the former.

[61] *Id.* at 1013.

The same is true of Section 8(b)(2). The statutory and constitutional immunity of an appeal for consumer support is identical regardless of the subsection of the statute under which it is sought to be interdicted. Indeed, the legislative history of Section 8(b)(2) is especially illuminating. As originally passed by the Senate, the words employed in 8(b)(2) were "to persuade or attempt to persuade an employer." H.R. 3020, 80th Cong., 1st Sess., Sec. 8(b)(2) (May 13, 1947)), in 1 Leg. Hist. 239-240. These words were changed in conference to "cause or attempt to cause" in order to make the language consistent "with the provisions guaranteeing all parties freedom of expression." 93 Cong. Rec. 6443, in 2 Leg. Hist. 1539. And so, as the examiner correctly concluded in this case, "I do not doubt the right of the . . . [Union] to publicize by appropriate means the fact that Alloy's employees are not represented by a union and even to persuade others by peaceful and truthful propaganda not to patronize Alloy for that reason if the persuasion is attempted to be accomplished by no more than the expression of 'views, argument, or opinion' " (R. 45). The customer appeals and the "We Do Not Patronize" list are in this class. Section 8(c) protects them and the Constitution would if Section 8(c) did not.

IV. THE BOARD'S ORDER IS TOO BROAD IN PROVIDING A BLANKET PROHIBITION AGAINST "RESTRAINING AND COERCING EMPLOYEES OF ALLOY MANUFACTURING COMPANY IN THE EXERCISE OF THE RIGHTS GUARANTEED IN SECTION 7 OF THE ACT."

Upon the assumption that the Board properly found a violation of Section 8(b)(1)(A) of the Act, its order is too broad in providing a blanket prohibition against "Restraining or coercing employees of Alloy Manufacturing Company in the exercise of the rights guaranteed in Section 7 of the Act" (R. 24). So uncircumscribed an order is at war with the principle that "To justify an order restraining other violations it must appear that they bear

some resemblance to that which the . . . [wrongdoer] has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past." *N.L.R.B.* v. *Express Publishing Co.,* 312 U.S. 426, 437. The order as it now reads encompasses within its sweep such conduct as "assaults and batteries on nonstriking employees; stoning, clubbing, and attempting to overturn automobiles of nonstrikers; threats of physical violence; and erecting barriers to plant entrances during picketing." N.L.R.B., Fifteenth Annual Report, 127 (1950). Nothing in the Union's activity in this case furnishes the slightest justification for an order which reaches such conduct. Furthermore, the Board's interpretation of the scope of Section 8(b)(1)(A) does not confine it to picketing and consumer appeals to secure recognition of and entry into a union shop agreement with a minority union. It extends to any activity which, upon a "balancing of the conflicting legitimate interests," the Board would find does not justify the alleged restraint. (Bd. br. pp. 27-30, 59-61.) Thus the order requires the Union to refrain from violations which are unknown and unknowable because they are still within the bosom of the Board. "A party is entitled to a definition as exact as the circumstances permit of the acts which he can perform only on pain of contempt of court." *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332, 341. Finally, the acts now found to be prohibited by Section 8(b)(1)(A) were for the first ten years of the administration of the Taft-Hartley Act uniformly found not to be within that section's purview. The doing of acts which, until the very case in which they were for the first time condemned, had theretofore been found to be beyond the section's scope, hardly shows that predilection for disobedience of the law which would justify an order extending to any and all of the dissociated offenses which the section reaches. The order should have been confined to the conduct found to violate Section 8(b)(1)(A). The "decree of enforcement should not extend

further than necessary to prevent the taking of the prohibited action. . . .'' *N.L.R.B.* v. *Crompton-Highland Mills, Inc.,* 337 U.S. 217, 226.

CONCLUSION

For the reasons stated, except to enforce that part of the Board's order which requires the Union to cease and desist from ''Attempting to cause Alloy, by means of picketing . . ., to discriminate against Alloy's employees in violation of Section 8(a)(3) of the Act'' (*supra,* pp. 52-53), the Board's petition for enforcement should be denied.

Respectfully submitted,

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September 1958.

APPENDIX

I

In addition to the bills discussed *supra* pp. 15-18, the following bills pertaining to recognition picketing were also introduced in the 85th Congress, 2nd Session:

1. H.R. 10101 (Jan. 20, 1958). This bill would amend Section 8(b) of the Taft-Hartley Act to make it an unfair labor practice for a union:

> (7) to engage in picketing on or about the premises of any employer for the purpose of organizing any of the employees of such employer or for the purpose of forcing or requiring such employer to recognize such labor organization as the representative of his employees, unless prior thereto such labor organization shall have obtained the approval in writing of at least 33-1/3 per centum of the employees of such employer of the class or classes which such labor organization is attempting to organize or represent.

The foregoing bill was also introduced as S. 3047 (Jan. 16, 1958), and it was likewise proposed as an amendment to S. 3974 on June 13, 1958.

2. S. 2927 (Jan. 9, 1958). This bill would amend Section 8(b) of the Taft-Hartley Act to make it an unfair labor practice:

> (7) to carry on picketing on or about the premises of any employer either for organizational purposes or for the purpose of forcing or requiring such employer to recognize or bargain with a labor organization as the representative of his employees if (A) another labor organization has been certified as the representative of such employees under section 9(c) within the preceding twelve-month period, (B) an election has been held under section 9(c) within the preceding twelve-month period and no labor organization has been certified as the representative of such employees, or (C) a petition has been filed under Section 9(c)(1)(A) by another labor organization or under section

9(c)(1)(B) by such employer, and such petition is pending before the Board.

3. S. 3618 (April 15, 1958). Section 201 of this bill would amend Section 8(b) of the Taft-Hartley Act to make it an unfair labor practice for a union:

> (7) to carry on picketing on or about the premises of any employer, prior to the holding of an election as provided under section 9(c), for organizational purposes or for the purpose of forcing or requiring such employer to recognize or bargain with a particular labor organization as the representative of his employees unless there shall have been filed with such employer at least five days before the commencement of any such picketing a petition signed by at least two-thirds of the employees of such employer (not counting any employee employed by such employer after beginning of the labor dispute in question) requesting that such employer recognize as the representative of his employees a particular labor organization designated in such petition.

II

Since the enactment of Section 8(b)(4)(C) by the 80th Congress, and excluding the bills already described that were introduced in the 85th Congress, 2nd Session, the following bills pertaining to recognition picketing were introduced in intervening Congresses.

1. H.R. 2032, 81st Cong., 1st Sess. (Jan. 31, 1949). This bill would repeal the Taft-Hartley Act, reenact the Wagner Act, and amend Section 8 of the Wagner Act to provide that:

> (b) It shall be an unfair labor practice for a labor organization—
>
> (1) to cause or attempt to cause employees to engage in a secondary boycott, or a concerted work stoppage, to compel an employer to bargain with a particular labor organization as the representative of his employees if—

(a) another labor organization is the certified representative of such employees within the meaning of section 9 of this Act; or

(b) the employer is required by an order of the Board to bargain with another labor organization; or

(c) the employer is currently recognizing another labor organization (not established, maintained, or assisted by any employer action defined in this Act as an unfair labor practice) and has executed a collective-bargaining agreement with such other labor organization, and a question concerning representation may not appropriately be raised under section 7 of this Act.

Other bills identical to the foregoing were introduced in that and succeeding Congresses: H.R. 4811, 81st Cong., 1st Sess., Sec. 208(b)(2) (May 23, 1949); S. 249, 81st Cong., 1st Sess., Sec. 106(d) (Jan. 31, 1949); H.R. 1311, 83d Cong., 1st Sess., Sec. 106(d) (Jan. 7, 1953); H.R. 3533, 83rd Cong., 1st Sess., Sec. 2(4), Feb. 26, 1953; H.R. 216, 84th Cong., 1st Sess., Sec. 106(d) (Jan. 5, 1955); H.R. 1000, 85th Cong., 1st Sess., Sec. 106(d) (Jan. 3, 1957). A bill to like effect, but not identically worded, is H.R. 4914, 81st Cong., 1st Sess., Sec. 8(a)(4)(B) (May 31, 1949). See also, S. Rep. No. 99, 81st Cong., 1st Sess., 59, 67-68, Minority Views, 29.

2. H.R. 4795, 83rd Cong., 1st Sess. (April 22, 1953.) This bill would prohibit any recognition strike or picketing except to secure the recognition of a certified union.

3. S. 1311, 83d Cong., 1st Sess. (March 13, 1953.) This bill would amend Section 8(b)(4)(C) to read as follows:

(C) forcing or requiring any employer to recognize or bargain with a labor organization as the representative of his employees (1) if another labor organization has been certified as the representative of such employees under the provisions of section 9, or (2), if, prior to such strike or concerted refusal, a petition has been filed under section 9(c)(1) by another labor organization requesting certification as the representative of such employees under the provisions of section 9, and such petition is pending before the board.